IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81- 81 6854

FREDDIE DAVIS, Petitioner,

v.

STATE OF GEORGIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF GEORGIA

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FREDDIE DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner, Freddie F. Davis, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia denying his application for certificate of probable cause to appeal the denial of his petition for writ of habeas corpus.

ORDER BELOW

The order of the Supreme Court of Georgia denying petitioner's application for certificate of probable cause to appeal the denial of petitioner's petition for writ of habeas corpus is not reported. A copy of said order and the order denying the petitioner's motion for rehearing is provided in the appendix. This case was previously remanded to the Georgia Supreme Court for reconsideration in light of Godfrey v. Georgia. Davis v. Georgia, 446 U.S. 961, 100 S. Ct. 2934, 64 L.Ed.2d 819

(1980). On remand the Georgia Supreme Court reaffirmed the death sentences and a second petition for certiorari was denied. Davis v. Georgia, 451 U.S. 921, 101 S. Ct. 2000, 69 L.Ed.2d 413 (1981).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The order of the Supreme Court of Georgia was entered on March 24, 1982 and a motion for rehearing was denied on April 8, 1982. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

AMENDMENT V, UNITED STATES CONSTITUTION:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

AMENDMENT VI, UNITED STATES CONSTITUTION:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

AMENDMENT VIII, UNITED STATES CONSTITUTION:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

AMENDMENT XIV, UNITED STATES CONSTITUTION:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CODE ANNOTATED SECTION 27-2534.1:

> . . . In All cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . . . The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony . . . The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim . . . The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt . . . .

QUESTIONS PRESENTED

1. Whether petitioner was twice put in jeopardy by the state's allegation of new "aggravating circumstances" at a new sentencing trial after appellate reversal of the original sentence of death.

2. Whether the statutory "aggravating circumstance" upon which the jury relied in deciding upon death is so overbroad and vague that petitioner's sentence based upon this statutory provision was unconstitutional in light of Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980).

3. Whether the Georgia Supreme Court has failed to follow the appellate review process which this Court assumed in Gregg, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976), to be necessary to the constitutionality of the Georgia statutory scheme.

4. Whether the use in evidence of three statements made by petitioner was proper when the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), were not given until after the second statement; were incomplete; and when the prosecution fails to show comprehension as well as relinquishment.

5. Whether the petitioner's trial counsel's representation was so inadequate and ineffective as to deprive petitioner of the "reasonably effective" assistance of counsel guaranteed by the Sixth and Fourteenth Amendments.

6. Whether the death penalty may be constitutionally imposed on the basis of jury instructions that: (a) fail to instruct the jury to focus on the characteristics of the defendant as well as the nature of the crime, (b) fail to explain the term "mitigating," or to direct the jury's attention to specific mitigating circumstances present in the case and (c) do not guide the jury to weigh mitigating circumstances against aggravating circumstances.

STATEMENT OF THE CASE

The charge for which petitioner was arrested, tried, and convicted and sentenced to death was that he acted in concert with Eddie Spraggins to rape and murder Frances Coe. The Supreme Court of Georgia affirmed the murder conviction and rape conviction in 1978 but vacated and reversed the imposition of the sentence of death as a result of inadequate jury instructions. [1]

At petitioner's first sentencing trial, the state alleged only the "aggravating circumstance" of "commission of an additional capital felony, to wit, the rape of Frances Coe"[2] and on that basis, the jury recommended a death verdict. After reversal of the death sentence on direct appeal, Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978), at the new sentencing trial, the state added the allegation of "aggravating circumstances" that the offense was "outrageous, wantonly vile, inhuman and involved torture and depravity of mind . . . and aggravated battery . . ."[3] Adding this second allegation involved no new evidence and in fact resulted in the use of the same witnesses and same testimony as at the first trial. No reason of any kind appears in the record for the addition of this new, second allegation of "aggravating circumstances" at the resentencing trial.

The jury instructions on sentencing and the death penalty[4] gave no examples of "mitigating;" did not attempt to define or explain the "outrageous, wantonly vile . . ." instruction; asked the jury only to "recommend;" and contained the other defects discussed infra.

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[1]Petitioner received a life sentence for the rape conviction.

[2]Page 283 of transcript of first trial in 1977. (Hereinafter referred to as "Tr.")

[3]Page 363 of transcript of resentencing trial in 1978. (Hereinafter referred to as "2d Tr.")

[4]2d Tr. pp. 353-362.

During presentation of the evidence, the investigating police officer was allowed to testify concerning three statements given by the petitioner. The first statement was given at home--petitioner was not a suspect supposedly--and no warnings of constitutional rights were given.[5] The second statement was taken at the police station[6] when obviously the police did not believe the first statement. No warnings of constitutional rights were given the defendant until after he made this second statement.[7] In this statement, petitioner admits going to the home of the deceased with the co-defendant Spraggins knowing that a robbery was planned; admits an assault on the deceased by Spraggins; admits knowledge of sexual assault; and gives the police knowledge of physical evidence which is used at the trial.[8] Constitutional warnings were given before the third statement where petitioner admitted killing the deceased but these warnings were incomplete.[9]

All three of the statements by petitioner were used in evidence against petitioner at the resentencing trial.[10]

Based on the above, the resentencing jury "recommended" death and petitioner was sentenced to death.[11]

The Supreme Court of Georgia affirmed the death sentence. Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978).

A timely petition for certiorari was filed with the Supreme Court of the United States and this petition was granted. On May 27, 1980, the Supreme Court of the United States reversed

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[5] 2d Tr. p. 147.

[6] 2d Tr. p. 148.

[7] 2d Tr. pp. 149, 142.

[8] 2d Tr. pp. 149-150.

[9] 2d Tr. p. 152.

[10] 2d Tr. pp. 142, 147, 149-152.

[11] 2d Tr. pp. 363-364.

petitioner's death sentence and remanded the case in light of Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980); Davis v. Georgia, 446 U.S. 961, 100 S. Ct. 2934, 64 L.Ed.2d 819 (1980).

Petitioner's motion for a full briefing and oral argument in the Supreme Court of Georgia was denied. Thereafter, petitioner's death sentence was reimposed by the Supreme Court of Georgia in an opinion filed September 24, 1980. Davis v. State, 246 Ga. 423, 271 S.E.2d 828 (1980). Again, a timely petition for writ of certiorari was filed with the Supreme Court of the United States and said petition was denied. Davis v. Georgia, 451 U.S. 921, 101 S. Ct. 2000, 69 L.Ed.2d 413 (1981).

On July 22, 1981, petitioner's original trial court reimposed a new execution date for the death sentence for August 3, 1981. On July 30, 1981, petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia and requested a stay of execution pending a hearing on his petition. The Superior Court of Butts County, the Honorable Alex Crumbley, granted petitioner's request for stay on July 30, 1981.

An evidentiary hearing was held before the Honorable Alex Crumbley on October 1, 1981. In an order dated February 5, 1982 and filed on February 8, 1982, petitioner's petition for writ of habeas corpus was denied by the Superior Court of Butts County. Petitioner filed a timely application for certificate of probable cause to appeal in the Supreme Court of Georgia which was denied on March 24, 1982. Petitioner then filed a motion for a hearing which was denied on April 8, 1982. The Georgia Supreme Court granted petitioner's motion to stay the remittitur for ninety (90) days from April 8, 1982.

No other or prior habeas corpus proceedings have been filed on behalf of petitioner.

REASONS FOR GRANTING THE WRIT

Petitioner submits this court should grant a writ of certiorari to enable this court to review the numerous, substantial constitutional deprivations associated with petitioner's trial and sentencing proceedings.

The recent decision of Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L.Ed.2d 270 (1981), brings the sentencing phase of a bifurcated trial within the meaning of the double jeopardy clause. The Georgia Supreme Court, however, in Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981), has interpreted the Bullington reversal of the death penalty as "not based on double jeopardy . . ., but on the fact that the death sentence was disproportionate to the life sentence previously imposed." Id. p. 425. This inconsistency in interpretation, particularly in view of the fact that at petitioner's second sentencing trial, new aggravating circumstances were introduced, presents this court with an area of law desperately needing resolution; prior to the imposition of the "unique and irretrievable" penalty of death. Woodson v. North Carolina, 428 U.S. 280 at 281, 96 S. Ct. 2978, 49 L.Ed.2d 944.

This court has previously vacated petitioner's death sentence in light of its ruling in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980); Davis v. Georgia, 446 U.S. 961, 100 S. Ct. 2934, 64 L.Ed.2d 819 (1980). The Georgia Supreme Court reimposed the death sentence thereafter by simply holding that the jury was "authorized" to impose the death sentence. Davis v. State, 246 Ga. 432, 271 S.E.2d 828 (1980). The Georgia Supreme Court has therefore acted inconsistently with this court's decisions of Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909. 49 L.Ed.2d 859 (1976) and Godfrey v. Georgia, supra, in that the Georgia Supreme Court improperly

acted as a sentencing body where the Georgia scheme places that responsibility in the trial court and invalidated the automatic sentence review focused on by this court in Gregg. See, Stephens, No. 81-89, May 3, 1982, 50 L.W. 4472, where a question was certified to the Georgia Supreme Court concerning the automatic review under Georgia law. Certiorari should be granted to resolve the inconsistencies between this court's mandates of constitutional safeguards in capital cases and their actual application and administration by the Georgia courts.

Eddings v. Oklahoma, _____ U.S. _____, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982), requires the definition of and the consideration of all relevant mitigating evidence and the weighing of mitigating evidence against evidence of aggravating circumstances in all capital cases. The instructions on mitigation approved in these decisions of the Georgia Supreme Court and in this case as well do not meet the requirements set forth in Eddings. Certiorari should be granted to resolve the inconsistency between this court's rulings on mitigating evidence and the practice of the Georgia courts.

Finally, this case presents the court with important questions concerning the use of statements obtained by interrogation without proof of compliance with Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) and the "reasonably effective" assistance of counsel standard set forth by the Sixth and Fourteenth Amendments.

Petitioner submits that because of the presence of substantial, unreviewed error, and because of the further development of capital sentencing law, he stands sentenced today on the basis of unreliable trial and appellate proceedings which resulted in an unwarranted conviction and death sentence. This court cannot tolerate such a result, for reliability must be the hallmark of any capital proceeding. Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L.Ed.2d 392 (1980).

I. THE ADDITION OF NEW ACCUSATIONS OF AGGRAVATING CIRCUMSTANCES AT THE SECOND SENTENCING TRIAL SUBJECTS PETITIONER TO DOUBLE JEOPARDY.

Under the Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 69 L.Ed.2d 270 (1981), rationale, double jeopardy protections are applicable at the sentencing phase as well as at the trial phase. In Bullington, this court expressly provided that "the protection afforded by the double jeopardy clause to one acquitted by a jury is also available to him, with respect to the death penalty, at his retrial." Bullington, page S. Ct. 1862. The Georgia Supreme Court in Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981) stated that "we do not agree that the failure to submit aggravating circumstances which are raised by the evidence is an implied directed verdict of acquittal on these aggravating circumstances." Godfrey, page S.E.2d 426. In so holding, the Georgia Supreme Court is in direct contradiction with this court's holding in Bullington.

Petitioner submits the rationale in Godfrey is erroneous in that it mistakenly states that the reversal in Bullington was "not based on double jeopardy, however, but on the fact that the death sentence was disproportioned to the life sentence previously imposed." Godfrey, page S.E.2d 425. Bullington, page S. Ct. 1860, provides that if a reversal is based on a ground other than the sufficiency of the evidence, it is proper to use the same aggravating circumstances on retrial. However, petitioner faced at his second sentencing trial an additional aggravating circumstance which was not found by the first sentencing trial. The first sentencing trial was the state's "one fair opportunity to offer whatever proof it could assemble" and the fact that the jury did not find the existence of the second aggravating circumstance is, contrary to the Georgia Supreme Court's Godfrey decision, an implied acquittal of that aggravating circumstance. Such an

acquittal goes to the sufficiency of the evidence and, under the Bullington rationale, submission to the jury of the new aggravating circumstance at the second sentencing trial puts the petitioner in jeopardy for an offense which he has already been acquitted.

As a result of the inconsistency between the Georgia Supreme Court's Godfrey decision and this court's Bullington decision and as a result of the habeas corpus trial court's reliance on Godfrey in denying petitioner's writ for habeas corpus, this court should grant petitioner a writ of certiorari.

II. THE INCLUSION OF THE NEW ACCUSATION OF AGGRAVATING CIRCUMSTANCES SO TAINTS THE SECOND SENTENCING JURY'S VERDICT AS TO REQUIRE THE DEATH SENTENCE TO BE VACATED.

As noted previously, the addition of a second aggravating circumstance at petitioner's second sentencing trial based upon the same evidence and the same witnesses as presented at the first trial constitutes a violation of petitioner's protection against double jeopardy. As such, the inclusion of the new aggravating circumstance so taints the verdict as to require the vacation of the death sentence.

The decision to impose the death sentence has been treated with particular scrutiny by the appellate courts. E.g. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972); Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976). The ultimate question regarding a death sentence is whether the jury which handed down the sentence was sufficiently guided in its deliberations to comply with the constitutional standards set forth in Furman.

This court's recent decision in Zant v. Stephens, No. 81-89 (May 3, 1982), 50 L.W. 4472, certified the following question to the Georgia Supreme Court: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" L.W., page 4474. The answer to be provided by the Georgia Supreme Court will determine for the court whether the Georgia capital sentencing system "would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster."

Petitioner contends that the addition of the second aggravating circumstance violates double jeopardy. Therefore, the question for this court is whether the death sentence imposed by a jury whose deliberations were impaired by the unconstitutional

imposition of the second aggravating circumstance, so taints the jury's imposition of the death penalty as to require the death sentence to be vacated. This court should grant a writ of certiorari to ensure that before a death sentence is imposed it was returned under the "deliberate, channeled guidelines required to eliminate constitutionally defective arbitrariness." Gregg, supra.

III. THE SUPREME COURT OF GEORGIA ACTED IMPROPERLY WHEN IT ACTED AS A SENTENCING BODY AND REIMPOSED PETITIONER'S DEATH SENTENCE AFTER REMAND WITHOUT ALLOWING PETITIONER TO BE HEARD OR SUBMITTING THE ISSUE TO A JURY FOR HEARING.

With respect to petitioner's first petition for a writ of certiorari, the Court remanded his case "for further consideration in light of Godfrey v. Georgia," but did not instruct the Georgia Supreme Court to put the matter before a newly convened sentencing jury. Mr. Justice Marshall's concurrence in Godfrey did suggest that a trial jury should be called:

> (I)t is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards.

Godfrey v. Georgia, supra, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398,411 (emphasis in original).

On remand in this case, the Georgia Supreme Court, sua sponte decided against convening a new sentencing jury and further refused to take briefs or oral argument on any matter regarding petitioner's case, despite petitioner's request for briefing and oral argument. Simply holding that petitioner's "jury was authorized to find, . . . that the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhuman." (emphasis added) The Georgia Supreme Court reimposed the death sentence.

That disposition of the remand was improper, however, since it effectively deprived petitioner of a trial by a jury that was guided in the meaning of subsection (b)(7) of the Georgia statute. That subsection permits the jury to recommend a death sentence if they find that the murder was aggravated in that it was:

> outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

It is "impossible for (the Georgia Supreme Court) to say whether a particular jury . . . so exercised its discretion," Godfrey v. Georgia, supra, L.Ed.2d at 412, and applied a constitutionally limited interpretation to (b)(7). Nothing in the sentencing instructions given petitioner's jury:

> implie(d) any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible or inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed.

Godfrey v. Georgia, supra, L.Ed.2d at 406.

This Court has repeatedly held that no criminal sentence may be based merely on appellate speculation that a jury, faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis. See, Chinarella v. United States, 445 U.S. 222, 100 S. Ct. 1108, 63 L.Ed.2d 348 (1980). This principle has been observed in death cases, where the Court has insisted that all "doubts . . . should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752, 68 S. Ct. 880, 92 L.Ed. 1055 (1948); accord, Calton v. Utah, 130 U.S. 83, 86-87 9 S. Ct. 435, 32 L.Ed. 870 (1889). Without assurance that the jury which sentenced the petitioner did so on the basis of a statute carefully fashioned to prevent arbitrary and capricious decisions, the petitioner's sentence to death should not have been reimposed.

IV. THE DENIAL BY THE SUPREME COURT OF GEORGIA OF PETITIONER'S REQUEST TO BE HEARD AND IN NOT RESUBMITTING THE ISSUE TO A JURY FOR A SENTENCING HEARING INVALIDATES GEORGIA'S AUTOMATIC SENTENCE REVIEW.

In upholding Georgia's death penalty statute, in Gregg, supra, this court focused on the automatic appeal to the Georgia Supreme Court as an important additional safeguard against the arbitrary and capricious imposition of the death penalty. 428 U.S. at 198, 204-206. However, this court in the recent case of Zant v. Stephens, supra, has raised serious questions as to its own reliance on the Georgia Supreme Court's automatic review process. Petitioner submits that the Georgia Supreme Court's review in his case did not and could not insure that jury discretion was controlled by clear and objective standards so as to eliminate the risk of arbitrary and capricious actions.

The Georgia Supreme Court is required under the sentencing review statute to consider whether the sentence was imposed under the influence of passion or prejudice. Georgia Code Annotated § 27-2537(c)(1). In one conclusory statement, without the basis for its conclusion, the Georgia Supreme Court dismissed this possibility. Davis v. State, 240 Ga. 423, 271 S.E.2d 828 (1980). As the court noted in its recurring on opinion "we recognize that the constitutionality of the Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing the capital sentences consistently with this concern." L.W., page 443.

It is apparent from the summary nature of the Georgia Supreme Court's opinion in this case that the automatic review afforded a defendant under this statute provides only an illusion of protection against arbitrary and capricious imposition of the death penalty. See the dissenting opinions of Mr. Justice Marshall joined by Mr. Justice Brennan in Zant v. Stephens, supra. As a

result, certiorari should be granted to consider whether this court's reliance on the Georgia Supreme Court's application of the Georgia automatic review process is misplaced.

V. THE JURY INSTRUCTIONS GIVEN AT THE SECOND SENTENCING TRIAL FAILED TO PROVIDE THE JURY WITH CONSTITUTIONAL GUIDELINES FOR ITS DELIBERATIONS AS THEY WERE INCOMPLETE, VAGUE AND OVERBROAD.

The jury instructions given at the second sentencing trial failed to provide the jury with constitutional guidelines for its deliberations as they were incomplete, vague and overbroad. The Eddings v. Oklahoma, _____ U.S. _____, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982) decision requires that state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. In petitioner's second sentencing trial, the instructions leading to the death verdict against petitioner do not clearly express the need to weigh the petitioner's particular characteristics, as well as the specific circumstances of the crime. Further, the only attempt at any explanation by the trial court to guide and direct the jury on the meaning and definition of the term "mitigating" was as follows:

> Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the moral culpability or blame.

In addition, this court's decisions--and a fair reading of the Constitution--call for more than a definition of "mitigating." They require that particular mitigating factors relevant in light of the record such as age and others, be called to the jury's attention as examples of what they could weigh against the aggravating circumstances which the court called to the jury's attention. (See also, the recent Fifth Circuit decision of Spivey v. Zant, _____ F.2d _____, No. 80-7243, where failure to so instruct the jury rendered the jury instructions constitutionally inadequate.)

In Gregg, the court assumed that such factors would be specifically called to the sentencing authority's attention. Under a fair reading of the constitutional requirements in death cases they clearly should be. In view of Eddings this court should grant certiorari in order to review the Georgia court's administration of evidence of mitigating circumstances.

VI. THE USE IN EVIDENCE OF THREE STATEMENTS BY PETITIONER WAS IMPROPER WHEN MIRANDA WARNINGS WERE NOT GIVEN UNTIL AFTER THE SECOND STATEMENT AND THE WARNINGS WERE INADEQUATE.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) requires that whenever an individual is taken into custody or otherwise deprived of his freedom in any significant way and is subjected to questioning, he must be advised of his privilege against self-incrimination; his right to an attorney; and related rights. The right to Miranda warnings specifically includes statements which are meant to be exculpatory for they can also be highly incriminating.

The first time petitioner was questioned he was at his home. The second time, however, he had been taken to the Manchester, Georgia Police Station.[12] It is difficult to imagine that a young (19 year old) ill-educated man being questioned in rural Georgia about a rape-murder did not feel and suffer under the coercive atmosphere criticized in Miranda v. Arizona. The result of this second questioning was for petitioner to make a statement which was highly damaging and which was used against him at trial. Only after these admissions by the petitioner did the police then belatedly give Miranda warnings.

This second statement by petitioner was followed by a third interrogation where Miranda warnings were given prior to interrogation. However, neither the warnings given after the second statement or before the third statement were complete. Both times the police investigator gave the Miranda warnings from memory[13] and both times the investigator totally failed to advise petitioner that he had the right to have the interrogation cease *at any time even* after questioning began. Miranda v. Arizona, U.S. at 444-45, 473-74.

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[12] 2d Tr. p. 148.

[13] 2d Tr. p. 144.

The continuing, serial progression of these three statements from the petitioner--each of which implicate the petitioner more strongly--demonstrate the dramatic effect on petitioner and the impact at his death sentencing trial of the prosecution's failure to give timely or adequate Miranda warnings.

Finally, there is simply no evidence in this record to support a finding that this 19 year old youth waived his right to remain silent or his right to a lawyer. Proof of waiver by the state of Georgia should have included (but did not) proof of understanding of the rights and "comprehension" as well as "relinquishment." Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L.Ed.2d 424 (1975).

VII. TRIAL COUNSEL FAILED TO PROVIDE PETITIONER WITH EFFECTIVE ASSISTANCE.

Measured against the appropriate "reasonably effective" standard, petitioner did not receive constitutionally adequate legal assistance at his capital trial.

The "reasonably effective assistance" standard is inherently flexible. What is reasonable in one situation is not reasonable in another. In this case, petitioner was sentenced to die. In that situation, the Eighth Amendment, together with the Sixth and Fourteenth, establish a particularly high standard of reasonableness.

Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) 96 S. Ct. 2978, 49 L.Ed.2d 944 (plurality opinion). To satisfy this heightened need for reliability, this court has held that certain procedures which are not required by the Constitution in other criminal cases are nonetheless due in capital cases under the Eighth Amendment. Thus, the level of procedural fairness that the Due Process Clause of the Fourteenth Amendment (and all of its incorporated amendments) require as a reflection of the concerns of the Eighth Amendment in capital cases is higher than that required in non-capital cases. Compare Woodson v. North Carolina, supra, with McGautha v. California, 402 U.S. 183, 91 S. Ct. 1454, 28 L.Ed.2d 711 (1971).

Accordingly, while a relatively high level of lack of preparation, error and neglect by counsel might satisfy the dictates of reasonableness in a non-capital case, it will not satisfy the higher degree of "reliability" that the Eighth Amendment demands of determinations "decisive (of) life . . . and . . . death." Gardner v. Florida, 430 U.S. 349, 359, 97 S. Ct. 1197, 51

L.Ed.2d 393 (1977) (plurality opinion). When a condemned man has not had consistently reliable assistance at his capital trial, therefore, "the state's criminal justice system has operated to deny (the) due process (required by the Eighth as well as the Sixth and Fourteenth Amendments) . . . and the state's consequent (execution) of the defendant is fundamentally wrong." Fitzgerald v. Estelle, supra, at 1336.

Petitioner did not receive "reasonably effective" or reliable assistance of counsel at his capital trial. Indeed, his lawyer's lack of ability to adequately prepare rendered the trial so fundamentally unfair that under any standard petitioner's constitutional rights were violated. As a consequence, a writ of certiorari should be issued for this court to review the application of the "reasonably effective" standard to petitioner's case.

VIII. CONCLUSION

For the foregoing reasons, petitioner respectfully submits that this court should grant his petition for a writ of certiorari to review the Supreme Court of Georgia's order denying his application for a certificate of probable cause to appeal the denial of petitioner's petition for writ of habeas corpus.

Respectfully submitted,

WOODS, BRYAN, WOODS & WATSON
A Professional Law Association

By: _____
William J. Marett, Jr.

By: _____
Larry V. Woods

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Nashville, TN 37203
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Georgia has been placed with the U.S. Mail, postage prepaid, and addressed to Mary Beth Westmoreland, Assistant Attorney General, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 and to Mike Bowers, Attorney General of the State of Georgia, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 on this the 4th day of JUNE, 1982.

_____
William J. Marett, Jr.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 81- 81 6854

FREDDIE DAVIS,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Freddie Davis, who is now held in the Georgia Diagnostic and Classification Center in Jackson, Georgia, asks leave to file the attached petition for writ of certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached hereto.

This the 4th day of JUNE, 1982.

Respectfully submitted,

WOODS, BRYAN, WOODS & WATSON
A Professional Law Association

By: Larry D. Woods
Larry D. Woods

By: William J. Marett, Jr.
William J. Marett, Jr.

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, Freddie Davis, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. I am currently incarcerated at the Georgia Diagnostic and Classification Center in Jackson, Georgia.

3. Because of my poverty I am unable to pay the costs of said cause.

4. I am unable to give security for the costs in this cause.

5. I believe that I am entitled to the relief that I seek in this action.

6. The nature of this action is briefly stated as follows:

I was sentenced to death by the state court in Georgia on the charge of murder and rape and I am presently incarcerated in the Georgia Diagnostic and Classification Center in Jackson, Georgia. The present proceeding is an application for writ of certiorari to the Supreme Court of Georgia which affirmed the denial of my petition for writ of habeas corpus based upon my claim that my federal constitutional rights have been violated as set forth in the petition for certiorari.

Freddie Davis Freddie Davis
FREDDIE DAVIS

Sworn to and subscribed
before me this 19th day
of April, 1982.

J. Michael Whitehead
Notary Public

My Commission Expires:
MY COMMISSION EXPIRES MARCH 21, 1985

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been placed with the U.S. Mail, postage prepaid, and addressed to Mary Beth Westmoreland, Assistant Attorney General, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 and to Mike Bowers, Attorney General of the State of Georgia, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 on this the 4th day of June, 1982.

William J. Marett, Jr.